

**VFI ASSOCIATES, LLC, ET AL.**

Plaintiffs,

V.

**LOBO MACHINERY CORP., ET  
AL.,**

Defendants.

Case No. 1:08CV00014

## OPINION AND ORDER

By: James P. Jones

United States District Judge

*Thomas A. Leggette, Leggette Law Firm, PLC, Roanoke, Virginia, for Plaintiffs; Jay H. Steele, Lebanon, Virginia, for Defendants.*

There is pending in this civil case Plaintiffs' Motion to Compel Defendant Esther Chang to Testify (ECF No. 211). The motion has been argued and is ripe for decision.

In advance of a recent deposition permitted by the court, Chang refused to answer any questions on Fifth Amendment grounds.<sup>1</sup> The plaintiffs do not contest that her answers would tend to incriminate her in a criminal prosecution. Instead, they argue that she has waived the privilege by answering questions at an earlier

<sup>1</sup> On motion, the court permitted the deposition, even though Chang had been previously deposed. Because Chang's counsel represented that she would refuse to answer any question at such a deposition, the court directed plaintiffs' counsel to submit the questions to be asked of her in writing. (Order, Oct. 14, 2010, ECF No. 199.) Counsel for Chang confirmed that Chang would refuse to answer all of the questions on the grounds that they would tend to incriminate her.

deposition in this case held on September 9, 2008, prior to her being added as a defendant. Chang did invoke the Fifth Amendment in her Answer filed August 14, 2009. By the time of the most recent deposition, a criminal investigation by federal authorities had begun of the events that are the subject of this civil case, allegedly at the instigation of the plaintiffs.

It is settled that the protections afforded by the Fifth Amendment may be deemed waived under certain circumstances. *See Stanley v. Star Transp., Inc.*, No. 1:10cv00010, 2010 U.S. Dist. Lexis 89121, at \*9-10 (W.D. Va. Aug. 30, 2010) (citing *Mitchell v. United States*, 526 U.S. 314, 321 (1999), and *Brown v. United States*, 356 U.S. 148, 154-55 (1958)). However, in these circumstances, I find that the answers given in the first deposition were insufficiently incriminating to constitute a waiver. *See Stanley*, 2010 U.S. Dist. Lexis 89121, at \*19-21.

Nevertheless, even where the assertion of a Fifth Amendment right by a litigant during a civil case is proper, that assertion may impose costs. In other words, parties “unquestionably may assert a Fifth Amendment privilege in [a] civil case and refuse to reveal information properly subject to the privilege, in which event they may have to accept certain bad consequences that flow from that action.” *Mid-Am. ’s Process Serv. v. Ellison*, 767 F.2d 684, 686 (10th Cir. 1985) (internal citation omitted). For example, preclusion of testimony at trial, *see Gutierrez-Rodriguez v. Cartagena*, 882

F.2d 553, 575-77 (1st Cir. 1989), or an instruction permitting the jury to draw an adverse inference from the refusal to testify, *see Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976), may be appropriate.

Under all of the circumstances here, I find that preclusion would be appropriate. In addition, I will consider an appropriate instruction if requested by the plaintiffs allowing the jury to draw an adverse inference from Chang's refusal to answer the questions posed.<sup>2</sup>

Accordingly, the motion is GRANTED IN PART and defendant Esther Chang is hereby precluded from testifying at trial.

It is so **ORDERED**.<sup>3</sup>

ENTER: November 22, 2010

/s/ JAMES P. JONES

United States District Judge

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<sup>2</sup> Because of Chang's close relation to the other defendants, including her status as accounting officer for the defendant corporations and as the spouse of defendant Robin Yuan, it is likely appropriate that the jury be instructed that an adverse inference may be drawn against all of these defendants. The plaintiffs also request that the burden of proof on their motion for summary judgment be placed on Chang because of her assertion of the privilege. *See SEC v. Colello*, 139 F.3d 674, 677-78 (9th Cir. 1998). I will consider that request when I consider the motion for summary judgment.

<sup>3</sup> The plaintiffs have also filed this motion in related cases, Nos. 1:08CV00027 (ECF No. 282) and 1:10CV00038 (ECF No. 22). The clerk will indicate on the dockets of those cases the disposition of the motion.